Social Institutions, Transgendered Lives, and the Scope of Free Expression

Richard Nunan

Abstract In addition to their official functions, state-sponsored social institutions, such as prisons and civil marriage, serve a more covert function, fostering and sustaining largely unnoticed social ideology. Because such institutions are to some degree coercive, and because the ideology thus promoted is designed to constrain channels of free expression, First Amendment protection is implicated, and can legitimately be applied to the social institution as a whole (not just as it impacts particular individuals). This view is defended through an examination of the ideological implications of the legal landscape governing marriage, as it affects transgendered individuals.

Keywords Transgender • Transsexual marriage • Marriage and free expression • Institutions and ideology

1 Social Institutions and the Cultivation of Ideology

> Culture produces the illusion of normative reality. Social discourse tells us what's real, and our perception of reality depends as much on that discourse as it does on our senses. We're all peering at that world through a gauze, a haze, a filter – and that filter is ideology. We see not what's there, but what we're supposed to believe is there. Ideology makes some things invisible and makes some things that aren't there seem like they're visible. It's true not just of political discourse, but of everything… Ideology is why people in one era might think their clothes look normal and neutral, but 20 years later they're absurd. One minute striped jeans are cool, the next they're a joke.
>
> Melford Kean[1]

[1] David Liss, *The Ethical Assassin* (New York: Ballentine Books, 2006), 89.

R. Nunan (✉)
College of Charleston, Charleston, South Carolina
e-mail: NunanR@cofc.edu

D. Golash (ed.), *Freedom of Expression in a Diverse World*,
AMINTAPHIL: The Philosophical Foundations of Law and Justice 3,
DOI 10.1007/978-90-481-8999-1_14,

Melford Kean, the title character in David Liss's philosophical novel, *The Ethical Assassin*, functions as an unacknowledged mouthpiece for Louis Althusser's analysis of social institutions as ideological apparatuses. But unlike Althusser, Kean regards even the repressive apparatuses of the state as nurturers of ideology. He draws no distinction between social institutions designed to cultivate/maintain beliefs conducive to social stability, thereby preserving the existing (presumably inequitable) system of property distribution,[2] and state institutions of violent repression, which, according to Althusser, are brought to bear whenever ideological indoctrination fails.[3] Our penal system, for example, which Althusser would regard as a response to the failure of ideology, Kean regards as functioning directly in the service of ideology, in two quite distinct ways.

One important ideological role of our penal system is to convince all of us of the social necessity of prisons as the natural solution to criminal activity, despite their failure to rehabilitate, and despite the fact that this failure is transparent precisely because prisons achieve just the opposite result. Presumably (although Kean does not explain this), we deal with the cognitive dissonance by telling ourselves that most criminals don't *want* to be rehabilitated. If our ideological training ultimately fails us with respect to the rehabilitative argument, we can resort to back-up ideology: retributivist arguments will serve instead.

The second ideological function of our penal system is revealed through a question which Kean poses to Lemuel Altick, the novel's young protagonist and narrator: if, instead of rehabilitating criminals, prisons "turn minor criminals into major ones, why do we have them? Why do we send our social outcasts to criminal academies?"[4] Altick's eventual answer explains how our penal system is as much concerned with the ideological education of criminals as it is with that of the general populace:

> We have prisons, not despite the fact that they turn criminals into more skillful criminals, but because of it… Criminals are people who, for the most part, come from the fringes of society, those who have the least to gain from our culture as it is. They have the most to gain from changing society or even destroying it and replacing it with a new order that favors them. Maybe a better order, maybe not…They go to prisons and learn how to break even more important laws. The next thing you know, these potential revolutionaries are now criminals. Society can absorb criminals fairly easily, revolutionaries less so.[5]

Thus, the second ideological function of our penal system is to transform criminals from potential social revolutionaries into violent psychopaths (or lesser malfeasants, but anarchically self-absorbed ones, not culturally unorthodox visionaries concerned about the welfare of others). The rest of us, meanwhile, have been trained, chiefly through our educational and political institutions, not to regard prisons in such a subversive light. We "choose" to discourage wide circulation of Melford Kean's second account of how this particular social institution cultivates ideology, lest the

---

[2] See Louis Althusser, "Ideology and Ideological State Apparatuses," in *Lenin and Philosophy and Other Essays,* ed. Louis Althusser (New York & London: Monthly Review Press, 1971), 127–186.

[3] Althusser, 138, 142.

[4] Liss, 92.

[5] Ibid., 319.

example serve as a catalyst to transform those of us still outside the prison walls into social revolutionaries instead.

Kean's analysis of the transformative function of prisons suggests a conspiratorial self-awareness on the part of state actors foreign to Althusser's account of the essentially unreflective manner in which social institutions coalesce into vehicles for the dissemination and perpetuation of ideology. Kean's subversive picture also seems unlikely to match the historical self-understanding of the architects of penal systems. But Althusser's account of the ideological role of social institutions functions a bit like Adam Smith's invisible hand: we act, both individually and collectively, under color of one set of motives, to achieve an outcome congruent with a very different set of motives. Evolutionary accidents flourish because they prove unintentionally efficacious at increasing reproductive success. The stability of social institutions is similarly contingent on their ability to yield results which promote social stability generally, even when we fail to recognize the true nature of those results. We need no conspiracy of the cognoscenti to explain the flourishing of ideologically loaded social institutions.

Note that social institutions do not have to be state-sponsored to carry significant ideological impact. Ideological impact can be quite serious even when social institutions have virtually no connection with state agents. Fashion ideology, for example, does not confine itself to matters as innocuous as the fate of striped jeans. It has played a critical role in the maintenance of binary gender ideology (the thesis that there are two and only two genders).[6]

2 State-Sponsored Institutions, Ideology, and the First Amendment

An obvious question arises now concerning those social institutions that *do* rely on the coercive power of the state. If, as Althusser suggests, we all go through life wearing ideological blinders that are cultivated and sustained by the various social institutions to which and through which we are acculturated, is social stability worth the price we pay by thus constraining the possible range of ideas which we might otherwise entertain, express to others, and act on? When such policies are state-sponsored in particular, First Amendment free expression rights are implicated.

To some extent, the answer is that we can't help it. Rigorous enforcement of social institutions inevitably forecloses the possibility of seriously entertaining some ideas at all, but *some* core of settled social institutions is necessary for social stability. Thus, even if Melford Kean is right about the ideological training fostered by our penal system, traditionalists might reply that we still have to remove the criminals

[6] See, e.g., Kate Bornstein, *Gender Outlaw: On Men, Women, and the Rest of Us* (New York: Vintage Books, 1995; originally publ., Routledge, 1994), 3, or some of Dean Spade's comments in the documentary film, *Boy I Am*, prod. Sam Feder, dir. Sam Feder & Julie Hollar, 72 min., Women Make Movies, 2006.

from the streets, in order to protect the law-abiding majority. That is what we mean by the 'clear and present danger'[7] and 'imminent lawless action'[8] standards for measuring constitutionally permissible constraints on free speech.

There are reasons to reject this line of reasoning. We might at least consider segregating prison populations much more than we do now, and creating environments more conducive to rehabilitation for all those segregated groups deemed capable of rehabilitation. We might also implement more strategies involving no incarceration at all. But skeptics might remain unconvinced that such measures would be sufficiently effective to justify the increased risk of social harm. It's not clear just how effective we would be at doing the segregating correctly, or at implementing effective rehabilitative measures. Skeptics might be dubious about undertaking such risks just for the sake of a rather abstract theoretical concern about ideology-mongering among the general public. And for social conservatives, there is the added consideration that ideology-mongering might be a good thing, since it operates always in service of preserving the *status quo*.

This last point of course begs the question: just how serious *are* we about First Amendment rights of free expression? Not very, perhaps. But the primary goal of the First Amendment generally, and of the right of free expression most especially, was to secure the deliberative freedom on which we profess this nation to be founded. Is this just pretence, because we don't really welcome social change through open public dialogue?

How fearful should we be? Not every free expression-motivated modification of state-sponsored social institutions need be as threateningly dramatic as the kind of prison reform just sketched. Modifying Althusserian 'institutions of repression' can be a hard sell. They are, after all, *supposed* to be repressive! But there are also state-sponsored social institutions that are, in Althusser's classification scheme, "merely" apparatuses for the fostering of ideology. Yet they too function coercively as epistemic barriers to the free expression of ideas. Here at least, if we take seriously the conceptual significance of free expression in the larger context of the First Amendment, the free expression clause may entail a level of protection that our courts and legislatures have never seriously countenanced. Viewing social institutions as ideologically freighted in Althusser's sense has the potential to radicalize our current understanding of the First Amendment right of free expression.

Consider, for example, the social institution of civil marriage, as applied to (and withheld from) transgendered individuals. In Althusser's classificatory scheme civil marriage would not count as part of the repressive apparatus of the state. But neither does it count as a social institution that falls mostly outside the parameters of state influence, like the gendered social conventions governing fashion. Civil marriage *does* rely on the coercive power of the state, which determines who may marry, and which confers specific economic rewards and legal rights on those who pass the test of eligibility. While that aspect undoubtedly renders the institu-

[7] *Schenck v. U.S.*, 249 U.S. 47, 52 (1919).

[8] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

tion somewhat repressive,[9] there are presumably some limits. The sort of 'imminent danger excuses' we might offer for constructing or retaining some robustly repressive social institutions (such as prisons) are not available to justify overtly repressive civil marriage policies. Therein lies the problem with recent judicial treatment of transgendered marriages.

There is one preliminary issue that must be addressed. Historically, free expression adjudication generally, and cases involving threats to the free expression of religion in particular, has brought scrutiny to bear on social institutions only when, and to the extent that, they directly constrain the free expression or free exercise rights of individual agents. There has been no systematic effort to evaluate the detrimental impact of any social institution taken as a whole, with respect to the chilling effect it may have on free expression because of the ideological freight which it delivers to all of us.

One might wonder, then, whether we even have the judicial machinery in place to address this broader issue of weighing the First Amendment significance of a state-sponsored social institution on its own merits. I believe the answer is that we do. The twentieth century history of establishment clause jurisprudence has been quite different from the jurisprudence of free expression and free exercise. One of the chief concerns implicit in that principle has been the fear that the creation of a particular class of state-sponsored social practices, especially in religiously-motivated curricular practices or in institutionalized devotional exercises in public schools) might have a chilling effect on the free expression rights of religious dissenters. Although this link between the establishment clause and the First Amendment rights of free exercise and free expression is not explicit in Supreme Court opinions, it is frequently implicit.[10]

Unlike the free expression and free exercise clauses, the primary focus of the establishment clause has always been on the boundary between licit and illicit state sponsorship of (or creation of) social institutions. And the concern has been

---

[9] See, e.g., Claudia Card, "Against Marriage and Motherhood," *Hypatia,* Vol. 11, No. 3, (1996): 1–23.

[10] Thus, in *Abington v. Schempp*, 374 U.S 203, 212 (1963), an establishment clause case striking down mandatory morning Bible readings in Pennsylvania and Maryland public schools, the majority quotes – apparently with approval – the Maryland plaintiffs' characterization of the situation. As atheists, Madeleine and William Murray complained that the policy "threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority; it pronounces belief in God as the source of all moral and spiritual values, equating these values with religious values, and thereby renders sinister, alien and suspect the beliefs and ideals of [the Murrays]".

Similarly, in *Lee v. Weisman*, 505 U.S. 577, 592–593 (1992), rejecting the constitutionality of a school-sponsored invocation at graduation, Anthony Kennedy observed for the majority that: "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools… Our decisions in Engel…and…Abington … recognize…that prayer exercises in public schools carry a particular risk of indirect coercion. The school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation".

directed precisely at the broad ideological effects such social institutions may induce among us. This adjudicative history can serve as a model for a much broader judicial scrutiny of the collective impact that a state-sponsored social institution may have on free expression. Given Althusser's analysis of the cognitive effects of social institutions generally, such concern should not be restricted to state involvement in recognizably religious social institutions and practices.

3 The Ideological Functions of Marriage

Turning now to our example, state-licensed marriage has of course always served to fulfill certain practical functions: stabilization of property distribution (between families, between spouses), transfer of property (inheritance by matrimonially legitimated heirs), a heightened level of confidence in paternity, and a state delegation of primary care-giving responsibilities to marriage partners and their offspring. Marriage functions also, however, as a tool in the service of fostering and maintaining ideological perspectives, including the notion that a large share of property distribution *should* be implemented in accordance with culturally normative marital property allocation.

The ideological function of marriage has certainly been in evidence in our own culture lately, as exhibited through the conservative backlash against same-sex marriage initiatives. The various state and federal Defense of Marriage Acts (DOMA initiatives) are attempts to perpetuate socially well-entrenched convictions concerning sex and gender: the hypotheses that only heterosexual copulation is morally legitimate, and then only for procreative purposes (although that particular thesis has been largely supplanted in western cultures by the conviction that sex for pleasure is also morally permissible, at least within the confines of serial heterosexual monogamy[11]), and the hypothesis that only monogamous heterosexual couples are fit to be parents – children need both a mommy and a daddy, preferably the same ones over time. With regard to parenting, marriage also helps reinforce sexist ideology about proper gender roles.

When divorce was still a socially marginal activity for which one repaired to Reno or Las Vegas, when sex outside marriage was officially discouraged (with at least *some* conviction), and when same-sex marriage was simply inconceivable, the social institution of marriage best fulfilled the ideological functions described in the previous paragraph. Like all ideological apparatuses, marriage was at its most effective in creating "an illusion of normative reality" when we didn't notice the ideological influences. But the advent of the Sixties counter-culture movement, with its professed commitment to sexual liberation, the coalescence of second-wave feminism, the growth of two-income families, the increasing prevalence of divorce

[11] See Jonathan Ned Katz, *The Invention of Heterosexuality* (Chicago: University of Chicago Press, 2007; originally publ. 1995).

and single-parent families, and the emergence of the gay rights movement, have all eroded civil marriage's ideological effectiveness, collectively transforming the ideology into a rear-guard action, while the institution itself is being gradually reconfigured in western cultures.

Nonetheless, in a relatively conservative culture like ours, the "old fashioned" view of marriage still carries significant weight. This has been perhaps most dramatically illustrated by the manner in which state courts have handled marriage disputes involving transsexuals. Collectively, these cases, which date back to the late 1960s, display not only a lack of humane empathy, but a record remarkable for its degree of judicial obtuseness, even from a socially conservative perspective.

4 Early Judicial History of Transsexual Marriage

The earliest cases concerned not marriage but birth certificates and name changes. Two early New York post-operative transsexuals' petitions for amending the sex on their birth certificates were denied on the ground that a transsexual's desire for "concealment of a change of sex…is outweighed by the public interest for protection against fraud."[12] The court does not specify just what fraud might be perpetrated, but the likeliest explanation was a fear that such modified birth certificates will function as tickets to the issuance of marriage licenses of dubious legitimacy.[13] To justify the refusal, the New York court appealed to a chromosomal standard of sexual identity in 1966, and again in a similar case 7 years later,[14] despite an intervening approval of a name change in a different New York court, which included commentary quite critical of the earlier birth certificate decision.[15]

Anonymous v. Anonymous, and *B. v. B.*, still more New York cases,[16] were the earliest domestic cases concerning transsexual marriages, specifically the dissolution of such marriages over charges of fraudulent deception by the defendant transsexuals. In *Anonymous*, the male to female (MtoF) transsexual partner was pre-operative, and failed to identify herself as such to the plaintiff husband prior to marriage. Upon discovery, the husband refused to have sex, and successfully petitioned to have the marriage declared void, even though his partner had subsequently undergone sex-change surgery. *B. v. B.* yielded a similar result for similar reasons, although the FtoM transsexual in that case had undergone a hysterectomy and double mastectomy prior to the marriage, but he had not had any genital surgery.

---

[12] *Anonymous v. Weiner*, 50 Misc.2d 380, 270 N.Y.S.2d 319, 322 (NY Sup. Ct., 1966).

[13] Defrauding whom? The unwitting spouse? The general public? How, exactly?

[14] *Hartin v. Director of the Bureau of Records*, 75 Misc.2d 229, 347 N.Y.S.2d 515 (NY Sup. Ct. 1973).

[15] *In re Anonymous*, 57 Misc.2d 813, 293 N.Y.S.2d 834, 837 (Civ.Ct.1968).

[16] *Anonymous v. Anonymous*, 67 Misc.2d 982, 325 N.Y.S.2d 499 (NYC Civ. Ct. 1971); *B v. B*, 78 Misc.2d 112, 355 N.Y.S.2d 712 (NY Sup. Ct. 1974).

In addition to the issue of fraudulent misrepresentation at the time of marriage, the court reasoned that, in the absence of a penis, the defendant could not function sexually as a male, and declared the marriage void on both counts.

Two years later, in 1976, a New Jersey appellate court ruled on the first pure case concerning transsexual marriage. *M.T. v J.T.*[17] involved a spousal support claim by an MtoF post-operative transsexual, after her husband of 2 years had abandoned their home and ceased supporting her. But in this case M.T. had undergone surgery prior to the marriage, having her male sex organs replaced with a vagina. J.T. was well aware of the situation, having paid for the surgery (they already had a long-standing relationship prior to their marriage), and M.T. and J.T. had sex subsequent to their marriage. Unique among these cases, the New Jersey Superior Court ruled that the marriage was legitimate, and J.T. was obliged to pay spousal support.

This case seems remarkably enlightened, given the legal and cultural environment in which it was decided, particularly in light of the court's commentary on the insensitivity of previous judicial reliance on the chromosomal standard for establishing sexual identity from birth, once and for all:

> It is the opinion of the court that if the psychological choice of a person is medically sound, not a mere whim, and irreversible sex reassignment surgery has been performed, society has no right to prohibit the transsexual from leading a normal life. Are we to look upon this person as an exhibit in a circus side show? What harm has said person done to society?[18]

These sentiments certainly are laudable, but there is something else going on in this case besides an endorsement of basic rights for *some* transsexuals. For in the *M.T. v. J.T.* analysis, not just any transsexuals count as deserving the law's attention, only "properly" post-operative ones with appropriate sexual functionality. That is what is meant by the distinction which the court draws between this case and the *B. v. B.* precedent set just 2 years earlier in an adjacent state:

> For purposes of marriage under the circumstances of this case, it is the sexual capacity of the individual which must be scrutinized. Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female.[19]

The scope of the humane gesture in *M.T. v J.T.* is limited, for this case is also an attempt to maintain the binary gender ideology fostered and sustained by the traditional institution of marriage. As RuthAnn Robson has observed, by endorsing M.T.'s particular brand of transsexuality, and her pairing off with J.T., the court is "imposing a singular and dominant reality" whereby "nothing fundamental would be altered" by M.T.'s postoperative transformation, because "heterosexual normality" has been reaffirmed.[20] The New Jersey court is simply acknowledging that there are

---

[17] *M.T. v. J.T.,* 140 N.J. 77, 355 A.2d 204, 205 (NJ Super. Ct. 1976).

[18] Ibid., 83.

[19] Ibid., 87.

[20] RuthAnn Robson, "A Mere Switch or a Fundamental Change? Theorizing Transgender Marriage," *Hypatia*, Vol. 22, No. 1 (Winter, 2007): 58–70.

precisely two genders, and M.T. deserves to be rewarded because she has "adjusted" herself to fit the prevailing social construct about gender.

For the goal of maintaining the ideological function of the civil institution of marriage, *M.T. v J.T.* was a sensible strategy. Despite appearing to be a judicial milestone in sexual liberation, the decision was actually quite socially conservative. The "good" transsexual, as Kate Bornstein has pointed out, is the one who buys into the standard therapeutic model: the trick is to "pass" as the other sex, both before and after surgery, and never to admit to ones transsexual history or identity. "Transexuality is the only condition for which the therapy is to lie."[21] The reason for this, Bornstein explains later, is to reaffirm the gender binary: there are two, and only two, sexes.[22] To this we might add the following corollary: everything else is either an unhappy biological accident (transsexualism and intersexuality) or sexual perversion: pedophilia, homosexuality, bisexuality and, in an earlier age, an unseemly interest in nonprocreative sex (see Katz on this last point).

That this attitude is the product of deeply rooted culturally ideology is nicely illustrated by Bornstein's own experience:

> I'm called "gender dysphoric." That means I have a sickness: a limited understanding of gender. I don't think it's that. I like to look at it that I was gender dysphoric for my whole life before, and for some time after my gender change – blindly buying into the gender system. As soon as I came to some understanding about the constructed nature of gender, and my relationship to that system, I ceased being gender dysphoric…I had my genital surgery partially as a result of cultural pressure: I couldn't be a "real woman" as long as I had a penis.[23]

Bornstein's definition of gender dysphoria is nonstandard – a "sickness", yes, but the alleged psychological malady is normally defined so as to assume that the patient understands gender well enough, but feels herself (or himself) to be housed in the wrong body, with respect to physical gender presentation. Bornstein's point is to turn the definition on its head: the real psychological disability is understanding gender poorly, by embracing the largely unquestioned cultural conviction that one's sexual anatomy and gender disposition have to be congruent in one of two socially approved ways. That someone as deeply reflective about gender issues as Bornstein could be seduced by this perspective nicely illustrates Althusser's point about the power of socially constructed ideology. The *M.T. v J.T.* court endorses precisely this language of congruence: "for marital purposes, if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards."[24]

---

[21] Kate Bornstein. *Gender Outlaw: On Men, Women, and the Rest of Us*. (New York: Vintage Books, 1995; originally publ. by Routledge, 1994), 62.

[22] Ibid., 125–128.

[23] Ibid., 118–119.

[24] *M.T. v. J.T.*, 87.

5 Post-DOMA Judicial History of Transsexual Marriage

In contrast to *M.T. v J.T.*, more recent cases are unwittingly subversive with respect to the traditional ideological functions of marriage. There have been less than ten such cases since the same-sex marriage debate began to grip the nation. None of these are cases of fraudulent misrepresentation in which a transsexual spouse failed to notify her or his partner of her of his gender history prior to the wedding. But neither do they follow the lead of *M.T. v J.T.* Typically, the contemporary cases involve judicial repudiation of ostensibly heterosexual marriages by means of a chromosomal standard applied to a post-operative transsexual partner.

In *Littleton v. Prange*,[25] for example, Christine Littleton, the post-operative MtoF transsexual widow of Jonathon Mark Littleton, was denied standing to file a wrongful death suit against her husband's physician, Mark Prange. The court telegraphed its attitude at the outset of the case, posing the question: "can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"[26] As in most contemporary cases, the court ultimately applied the authority of the local DOMA law, using a chromosomal standard of sexual identity:

> Some physicians would consider Christie a female; other physicians would consider her still a male. Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied.
>
> We recognize that there are many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics. But courts are wise not to wander too far into the misty fields of sociological philosophy. Matters of the heart do not always fit neatly within the narrowly defined perimeters of statutes, or even existing social mores. Such matters though are beyond this court's consideration. Our mandate is…to interpret the statutes of the state and prior judicial decisions. This mandate is deceptively simplistic in this case: Texas statutes do not allow same-sex marriages.[27]

With respect to the goal of sustaining the ideological function of marriage (preservation of the binary view of gender, and privileging procreative heterosexuality within that perspective), the chromosomal standard to which almost all post-*M.T. v. J.T* cases resort makes little sense. It entails that a pre-operative MtoF transsexual could secure a marriage license, provided that she has a penis, and her partner a vagina, even though both "present" as female. But if she abandons her lover at the altar, completes the MtoF surgery, and subsequently marries someone with a penis since birth, these courts would void her relatively conventional heterosexual marriage, because she still has male chromosomes.

Even worse with respect preservation of the gender binary ideology in a DOMA state like Texas, would be a case in which a lesbian post-operative MtoF transsexual (for example), now possessing a vagina of non-biological origin, applies for a marriage license with her lesbian partner (with a vagina from birth). Relying on

---

[25] *Littleton v. Prange,* 9 S.W.3d 223 (Tex. App. 1999).

[26] Ibid., 224.

[27] Ibid., 231.

the judicial precedent set in *Littleton*, the Texas courts would be obliged to sanction this special class of same-sex marriages, on the principle that the transsexual litigants were still chromosomally of the opposite sex from their partners. Indeed, this happened in at least two cases the following year (2000) in San Antonio, where the Bexar County Marriage Clerk subsequently issued a public invitation to any other similarly-situated couple who wished to marry.[28]

Stranger still is the case of *In re Estate of Gardiner*,[29] because the Kansas Supreme Court ruled that J'Noel Gardiner was not really either a man or a woman, but a transsexual. As such, she could not inherit her intestate deceased husband's estate, because her marriage to him was void under Kansas's DOMA. In the Court's words:

> The words 'sex', 'male', and 'female' in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of "persons of the opposite sex" contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to 'produce ova and bear offspring' does not and never did exist."[30]

In response to a lower court argument that the Kansas DOMA law was silent on the question of marriage eligibility of post-operative transsexuals, the Kansas Supreme Court added that "the legislative silence…indicate[d] that transsexuals are not included. If the legislature intended to include transsexuals, it could have been a simple matter to have done so."[31]

Since the Kansas DOMA countenances marriage only between males and females, it would appear that, in Kansas at least, post-operative transsexuals may not marry *anyone*, rendering the Kansas DOMA in violation of a constitutionally recognized fundamental right to marry.[32]

Even this precedent is ambiguous, though. In one of the very last lines of the *Gardiner* opinion, the Kansas Supreme Court leaves an opening for future fudging:

> Finally, we recognize that J'Noel has traveled a long and difficult road. J'Noel has undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling,

---

[28]For a discussion of these details and further citations, see Phyllis Randolph Frye and Alyson Dodi Meiselman, "Same-Sex Marriages have Existed Legally in the United States for a Long Time Now," *Albany Law Review,* Vol. 64 (2000–2001): 1031–1071. (My thanks to Jacob Hale for first drawing my attention to the post-*Littleton* cases in Texas.).

[29]*In re Estate of Gardiner,* 273 Kan. 191, 42 P.3d 120 (2002).

[30]Ibid., 213.

[31]Ibid., 214.

[32]See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) , in which marriage is categorized as "one of the basic civil rights of man" and a "basic liberty". As such, the right to marry is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore "implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment [due process clause], become[s] valid as against the states," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), (Cardozo, J., majority) This principle was reaffirmed in *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

Robson makes the same point more briefly (Robson, 62), crediting Julie A. Greenberg, "When Is a Man a Man, and When is a Woman a Woman?" *Florida Law Review*, Vol. 52 (2000): 762.

> and reassignment surgery. Unfortunately, after all that, J'Noel remains a transsexual, and a male for purposes of marriage under [Kansas law]."[33]

On the one hand, this passage suggests that the chromosomal standard is operational in Kansas, too, leaving that state open to judicial approval of the same subclass of same-sex marriages to which the recent chromosomal precedent has exposed Texas (and also Ohio[34] and Florida[35]). On the other hand, the phrase 'remains a transsexual' suggests that J'Noel was always a transsexual (which, of course, is generally true of transsexuals), in which case, by the Court's earlier reasoning, she *never* had a right to marry in Kansas.

That the Kansas Supreme Court has created such a judicial mess for itself and the lower Kansas courts is indicative of the general level of cultural confusion which has now overtaken the social institution of marriage. We have progressed from an era in which the *M.T. v. J.T.* court could devise a relatively humane solution to the 'transsexual conundrum' while simultaneously maintaining a traditional ideology of heteronormative privilege sustained by the social institution of marriage, to an era in which the *Gardiner* court unwittingly endorsed the existence of a third sex, and multiple judicial jurisdictions have created precedents for undermining the gender binary through legal recognition of a special subclass of same-sex marriages. Conceptually speaking, how is the Kansas Supreme Court's admission that J'Noel Gardiner was always a transsexual any less radical than Kate Bornstein's observation that we need to acknowledge the existence of "non-operative transsexuals"[36] as well as pre- and post-operative ones, people who think of themselves as transsexual without any need or desire for genital surgery, because they simply don't buy into the binary construction of gender in the first place?

We might reasonably ask how matters came to such a pass. Why didn't later courts simply endorse the reasoning in *M.T. v. J.T.*? I suspect the answer has to do with the emergence of varieties of transsexualism, the gradual recognition that erotic orientation and gender identity are orthogonal properties. Not all transsexuals are heterosexuals *manqué*, as the *M.T. v. J.T.* court apparently believed back in 1976. Perhaps there was always some suspicion that transsexuals and their intimate partners might harbor a "hidden gay agenda".[37] But the view that there could be non-heterosexual transsexuals was certainly not yet fully articulated in 1976, when there were as yet no public intellectuals arguing to the contrary, either positively

---

[33] *Gardiner*, 215.

[34] *In re a Marriage License for Nash* (2003) not Reported in N.E.2d., WL 23097095, Ohio App. 11. See also the pre-DOMA denial of a name-change petition, *In re Ladrach*, 32 Ohio Misc.2d 6, 9, 513 N.E.2d 828 (Probate Ct. 1987), and a similar more recent case, *In re Maloney* (2001) not reported in N.E.2d, WL 908535, Ohio App. 12 Dist.

[35] *Kantaras v. Kantaras*, 884 So.2d 155, 29 (2nd Dist. Ct. App. 2004).

[36] Bornstein, 121.

[37] For a possible example of this reasoning at work, see the military discharge case, *Hoffburg v. Alexander*, 615 F.2d 633 (1980).

(e.g., Kate Bornstein (discussed earlier), Leslie Feinberg,[38] Alluquére [Sandy] Stone[39]) or negatively (e.g., Janice Raymond[40]). Once that view entered public discourse, the courts had to confront the worry that they might be abetting gay relationships if they authorized *any* transsexual marriages. But asserting that *no* transsexuals may marry, as the Kansas Supreme Court may now have done in *Gardiner*, is equally problematic. Hence the current mess.

6 Transgender Marriage and the Right of Free Expression

Returning now to the right of free expression, why should we still be waiting for this particular element of our culture's Althusserian ideological apparatus, the exclusively heteronormative institution of marriage, to finish its decomposition process? There are, I believe, only two reasons why we might refrain from questioning the maintenance of a particular state-sponsored social institution on free expression grounds.

There is the lesson of Holmes' aphorism[41] about falsely shouting fire in a crowded theater: not all forms of speech are protected, in particular not those which endanger others. Restrictive legislation is then constitutionally permissible. Perhaps we should concede that, even when a government-sponsored social institution curtails free expression to some degree, it might be possible that loosening the cultural bindings sustained by *that* particular institution would cause sufficiently great harm to outweigh the cost to free expression – if not through direct harm to particular individuals, perhaps through indirect harm fostered by the erosion of socially valuable ideology which that institution, taken as a whole, is designed to nurture. The prospect of both direct and indirect harms, I take it, are present in the arguments sketched earlier for retaining our prison system more or less as it is.

Then there is the simple failure to recognize the constraint on free expression, because the institution in question has fostered an ideology so pervasive that we don't ever notice its presence. If Althusser is to be believed, this happens quite a lot. It was once true, I think, about the heteronormative aspects of the institution of marriage, but that is an excuse we no longer have. Once the constraints on free expression are culturally accessible, it is appropriate to demand, concerning any state-sponsored social institution, a reasoned argument in defense of the violation of the First Amendment rights of "discrete and insular

---

[38] Leslie Feinberg, *Stone Butch Blues* (San Francisco: Firebrand Books, 1993); *Trans Liberation: Beyond Pink and Blue* (Boston: Beacon Press, 1999).

[39] Alluquére Stone, "The Empire Strikes Back: A Posttranssexual Manifesto," *Camera Obscura,* Vol. 10, No. 2 (May 1992): 150–176.

[40] Janice Raymond, *The Transsexual Empire: The Making of the She-Male* (Boston: Beacon Press, 1980).

[41] *Schenck*, 52.

minorities"[42] who suffer the social opprobrium fostered by the institution in question. And in the current case, it is transparently obvious that the above implications of Holmes' aphorism do not apply, since the ideology to be preserved by traditional marriage laws is no longer socially compelling. As Judith Christley framed the issue in her dissent to an Ohio court decision to uphold the denial of a marriage license to an FtoM transsexual and his female partner:

> the majority holds that, in an effort to protect the institution of marriage, a transgender person may not marry someone belonging to that person's original gender classification. In doing so, it claims to be protecting the sanctity of marriage. My question to them is "What is the danger?" How is anything harmed by allowing those, who by accident of birth do not fit neatly into the category of male or female, from enjoying the same civil rights that "correct sex" citizens enjoy?[43]

No one should live in fear of the legal consequences of openly declaring themselves to be transgendered. On one natural reading of the *Gardiner* decision in particular, any transgendered Kansas citizens would be well advised to pass as whatever was reported on their birth certificates, and marry accordingly, if socially recognized long-term partnerships are part of their life plan. It is hard to envision a more profound violation of the right of free expression than that.

To frame the issue a slightly different way, think about the cultural practice of passing across racial lines. This practice is certainly not uncommon in our society, and when anti-misegenation laws and Jim Crow were in play, for those who *could* pass, and who wished to pursue certain life plans freely open to others, the practice was accompanied by much the same kind of legal compulsion that I'm attributing to the Kansas transsexual today. And yet today we would surely say that any legal requirement that one *must* self-identify as African-American if one has any African American ancestors, would be a gross violation of an individual's right of free expression.

The culturally-induced violations of free expression here contemplated are actually even more profound, in both cases. Anatole Broyard, the former *New York Times* book critic, with mixed-race Louisiana Creole ancestry, spent his entire adult life passing as white, most especially to his own children. He once argued in print that, to be an authentic individual, as a Negro, required "a stubborn adherence to one's essential self…his innate qualities and developed characteristics as an individual, as distinguished from his preponderantly defensive reactions as an embattled

---

[42] *United States v. Carolene Products*, 304 U.S. 144, 153, n.4 (1938). While there is no formal policy of heightened scrutiny in First Amendment cases generally (unlike equal protection or due process cases), the Supreme Court effectively endorsed such a policy in cases with free exercise implications for three decades, starting with *Sherbert v. Verner*, 374 U.S. 398 (1963), until it abandoned the practice of requiring the government to provide "compelling" justifications for free exercise infringements in *Employment Div., Dep't. of Human Resources of Oregon v. Smith*, 494 US 872 (1990). That case, however, has been a subject of controversy, and it is not clear just how long it will serve as precedent. Compare, for example, Anthony Kennedy's remark that "there are heightened concerns with protecting freedom of conscience free expression cases," just 2 years later in *Lee v. Weisman* (discussed in note 7 above).

[43] *Nash*, 12.

minority."[44] Although one might reasonably ask whether Broyard isn't guilty of assuming the atomic individualism associated (disparagingly) with contemporary political liberalism, he is also expressing a noble aspiration: why should one be forced to occupy artificially contrived and invalid conceptual boxes not of one's own making? Yet it is not clear that, in the larger racially-charged culture in which Broyard found himself, his aspiration was even possible to achieve. One theme of Bliss Broyard's recent book about her father[45] is the question how one can be fully authentic in this individualist way, if one is simultaneously prepared to deny pieces of one's own history, for the sake of repudiating a culturally-imposed classification system in which one does not believe? African essentialism, like white European essentialism, is completely unwarranted. But in a racially polarized culture, racial family histories (in our culture, black and white ones in particular) inevitably inform our individual identities in various ways. To deny the existence of those influences, however culturally imposed, is to deny ourselves.

Similarly, how can one declare oneself a non-operative transsexual in a cultural setting in which transsexuality is still almost exclusively understood as a medically pathologized condition contingent on binary gender ideology? Sometimes, there simply are no judicial remedies for social constraints on morally legitimate forms of free expression. But sometimes there are. In the case of transgender, we can probably start talking seriously about what it means to be a 'non-operative transsexual', or what it means even to be transgendered, only after we shed the binary gender ideology. For that at least, there is a constitutional remedy in the First Amendment, if only we are prepared to take it seriously. To do that we must first acknowledge that that we have come to recognize the social institution of marriage as being ideologically oppressive, and then insist that the courts live up to the promise of the right of free expression by taking the social mechanics of ideological oppression seriously.

[44] Anatole Broyard, "Portrait of the Inauthentic Negro," *Commentary*, July 1950, 57.

[45] Bliss Broyard, *One Drop: My Father's Hidden Life – A Story of Race and Family Secrets* (New York: Little Brown, 2007). For an equally thought-provoking commentary from the other side of the passing divide, see Adrian Piper, "Passing for White, Passing for Black," *Transition,* No. 58 (1992): 4.